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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison,
Attica, New York,
Appellee.

APPELLANT'S REPLY BRIEF.

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POINT I.

The cases and governmental documents, relied on by opposing counsel in their briefs, fail to defeat appellant's claim.

Davis v. Johnston, 144 F. 2d 862, 9th Cir. 1944; cert. den., 323 U. S. 789, 819.

That case intimates that Appellant is not entitled to the remedy of habeas corpus. It held that where jurisdiction of the trial court is in issue and is dependent upon facts

alleged, the finding of jurisdiction is conclusive on the parties in a collateral attack regardless of whether question of jurisdiction was raised by accused. It is distinguishable from the present case because the indictment in this case simply alleged that the crime was committed within the City of Salamanca, and the County of Cattaraugus, as a jurisdictional allegation. There is no dispute as to that and no collateral attack is, or could be, made on that allegation. Appellant's position on that point is clearly sustained by the following cases:

Worcester v. State of Georgia, *Supra;*
Ex parte Crow Dog, *Supra;*
Bowen v. Johnston, 306 U. S. 19 (1939);
Hawk v. Olsen, Decided by this Court at the October Term, 1945, and appearing in U. S. Supreme Court Law. Ed. Advance Opinions, Vol. 90—No. 2, Page 67;
Indians v. Chicago Tolletsome Club, 53 Fed. 18 (1892) and
Wick v. U. S., 29 F. 191 (1923).
New York v. Dibble, 21 Howard 366, Affirming 16 N. Y. 203.

Confusion in connection with this case can be eliminated by reference to New York Indians, (5 Wal. 761, page 763), Treaty of 1838, (7 Stats. at large 550), Treaty of 1842, (7 Stats. at large, 586), Treaty of 1857 (11 Stats. at large, 735), and the citations of the case.

By looking to 16 N. Y. 203, it will be discovered that the facts in the Dibble case arose in 1853 and by reference to 21 How. 366, it will be noted that the decision in that case was made at the December term in 1858. By reference to the Treaty of 1857, it will be observed that that treaty was

proclaimed on March 31, 1859. By reference to the Treaties of 1838 and 1842 and what was said in the statement of the case in New York Indians, 5 Wall, at page 763, it will be observed that between April 3, 1845 and March 31, 1859, the Tonawanda Reservation, unlike the Allegany Reservation, was subject to extinguishment of the Indian Title and, therefore, susceptible to having the laws of the State of New York extended into that reservation.

Appellant's claim, regarding this distinction between the Tonawanda Reservation and the Allegany Reservation, is sustained by the case of United States v. National Gypsum Company, *et al.*, 141 Fed. Supp. 2d 859, decided in March, 1944 by the Circuit Court of Appeals, Second Circuit.

> United States, *ex rel.* Kennedy v. Tyler, 269 U. S. 13, Affirming in part United States v. Waldow, 294 Fed. 111.

The District Attorney's brief cites United States v. Waldow, 294 Fed. 111 but fails to set forth that that is the same case which was appealed to the United States Supreme Court and decided as Kennedy v. Tyler in 269 U. S. 13. That Supreme Court case is distinguishable and not applicable to the present situation. The United States Supreme Court held that the Court below should have dismissed the writ on the theory that petitioner should have first exhausted his remedy in the state court and not on the merits. The three following excerpts, from the Matter of Patterson v. Seneca Nation, 245 N. Y. 433, show the Tyler case does not support respondent's contention:

> "It is true that in the recent case of United States *ex rel.* Kennedy v. Tyler (269 U. S. 13) the Supreme Court of the United States stated that the State of New York, as early as the year 1849, 'assumed governmental control' of the Indians at their request, created and de-

fined the jurisdiction of the Peacemakers Court, and administered the laws enacted 'through its courts.' We do not understand, however, that that court undertook to define, for the courts of the State, the relation between the State and the Seneca Indians, or to determine that the statutes of the State applied to the tribal Indians, or that its courts had jurisdiction over them. On the contrary, it expressly declined to make the determination saying: 'In the regular and ordinary course of procedure, the power of the highest State court in respect of such questions should first be exhausted'." (Pages 440-441.)

"It was not accurate to say, therefore, that the State of New York in the year 1849 'assumed governmental control' of the Indians. On the contrary, in that year and subsequently, by its approval of the Indian constitution in its original and amended form, the State of New York acknowledged the Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them." (Page 443.)

"It does not otherwise make applicable to Indians either the common law or statute law of the State, whether civil or criminal." (Page 445.)

Bates v. Clark, 95 N. Y. 204.

This case was decided by the United States Supreme Court at its October Term in 1877 and before the adoption of the Revised Statutes in 1878. It decided that all the country described by the Act of 1834 as Indian Country remains Indian Country so long as the Indians retain their original title to the soil and ceases to be Indian Country whenever they lose that title in the absence of any different provision by treaty or by act of Congress. It, in no way, undertook to decide whether any reservation within any of the original thirteen states was Indian Country and in no

way undertook to reverse or modify the decision in the United States Supreme Court case of Worcester v. Georgia, 31 U. S. 515, 6 Pet. 515, which case, as pointed out on Pages 23 and 24 of Appellant's Main Brief, was decisive as to state rights within the Allegany Reservation. See, regarding this case Vol. 24, 1939-40, Minnesota Law Review, pages 147 to 151.

Ex parte Kan-Gi-Shunca or *Ex parte* Crow Dog, 109 U. S. 556.

This case, decided by the United States Supreme Court in 1883, eliminated any doubt concerning what should be considered "Indian Country" after the adoption of the Revised Statutes in 1878.

One of the purposes of that decision was to make clear the distinction as to what was "Indian Country" under the Act of 1834 and what portion of the country that term was to apply to after the adoption of the Revised Statutes. The quoted portion of that opinion applicable to this case and showing that the place in question is Indian Country is set forth on Page 19 of Appellant's Main Brief. See also regarding this case, pages 150 to 153 of Vol. 24, 1939-40 of the Minnesota Law Review.

Benson v. United States, 44 Fed. 178.

This case, decided on November 12th, 1890, by the Second Circuit, was an opinion by a divided court and no attempt was made to appeal from that case to the United States Supreme Court. While it is true that the case did decide that the City of Salamanca was not Indian Country, it is clear from the opinion that that Court, for its decision, relied on the mistaken notion that the decision in the case of Bates v. Clark, *Supra*, was made subsequent to the adoption of the Revised Statutes.

This error by the Circuit Court was pointed out in the opinion of Justice Knight in U. S. v. National Gypsum Company, 49 Federal Supp. 206, reversed by the United States Circuit Court of Appeals, 2d Circuit, March 31, 1944, in 141 Fed. 2d 859, on another point. That opinion quoted from U. S. vs. Leathers, 26 Fed. Cas. No. 15,581, P. 897, 899. As heretofore pointed out in the briefs, the definition of the term "Indian Country" in Bates vs. Clark limited the term to that portion of the country described in the Act of 1834, while the subsequent decision in the Crow Dog Case, *Supra*, in 1883, quoted the definition in the Bates Case so that it would be compared with the enlarged definition which was to apply hereafter under the Revised Statutes. That definition and all subsequent United States Supreme Court decisions on that question eliminated any doubt that this reservation is Indian Country.

Comparison of what that Court said in its opinion in interpreting the definition "Indian Country" in the Crow Dog Case, *Supra*, when compared with the Supreme Court's definition in that case and subsequent United States Supreme Court cases which reiterated and explained the definition in the Crow Dog case, *Supra*, reveal that the Circuit Court misread and misinterpreted the definition. Furthermore, that case neglected to confine the Dibble Case, *Supra*, which dealt solely with the Tonawanda Reservation to that particular reservation and the different treaties governing that reservation. That the Dibble case, *Supra*, did not apply to this reservation has heretofore been pointed out in this brief.

Seneca Nation v. Christie, 126 N. Y. 122.

The United States Supreme Court in 162 U. S. 283, at pages 289 and 290, held that a writ of error could not be

maintained because the Court of Appeals decision was based on grounds, not involving a federal question.

United States v. Bailey, 1 McLean 234.

The decision in this case purports to have been made in 1834 and reported by Hon. John McLean, Circuit Justice. This case was decided prior to the Federal Act of March 3rd, 1871 (App. C to Appellant's Main Brief, Page 37), which dispensed with treaties and as a consequence left Indian matters to Congress. This case did not undertake to decide that state laws could not be extended into Indian Reservations within a state as decided in Worcester v. Georgia, *Supra*, in 1832. It is difficult to acquiesce in the Attorney General's claim that this decision was made by the same Justice McLean who had participated in the United States Supreme Court decision in the case of Worcester v. Georgia, *Supra*, two years before. This is so because of the opinion in the prior case and following from the opinion in that case on page 239, wherein the Court said:

> "The state of New York, for many years has punished its citizens for crimes committed in the Indian territory within its limits; and the state of Georgia, before its laws were extended over the Cherokee country, within the state, punished its own citizens for offences committed within that territory; and we are not aware that the right of either state to do this has been questioned."

By comparing the above quoted with the following from page 560, of Worcester v. Georgia, *Supra*, it will be seen that the United States Supreme Court had, two years before, definitely decided that the State of Georgia could not extend its laws into the Cherokee Reservation within the State of Georgia:

> "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurate-

ly described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."

United States v. McBratney, 104 U. S. 621 and Draper v. United States, 164 U. S. 240.

These cases have no application to this case because they involve the question of jurisdiction of Indian Lands in states admitted by an enabling act. As heretofore pointed out, this reservation is within the State of New York, which was one of the thirteen original states and under a treaty similar to the one involved in the case of Worcester v. Georgia, *Supra*.

Two cases, (pages 14, 15 of Attorney General's Brief) one involving murder of an Indian by an Indian, and the other involving the murder of a white man by an Indian, are offered by respondents to show that New York State Courts exercised criminal jurisdiction over Indian Reservations within the state, between 1802 and 1821. Such cases only tend to establish the New York State Courts acted contrary to law as evidenced from the subsequent decisions in the Worcester vs. Georgia case, *Supra*, the Crow Dog case, *Supra*, and U. S. vs. Boylan, *et al.*, 265 Fed. 165.

Numerous cases and governmental documents have been cited by opposing counsel. Such cases and the effect of such documents are either distinguishable or not applicable. This contention is to be evidenced by comparing such with what has been pointed out in Appellant's Main Brief and the analysis of cases under this point.

POINT II.

Arguments of opposing counsel, in their briefs and the various reasons, relied upon in some of the prior opinions in this case, fail to defeat appellant's claim.

Respondents and some of the prior opinions in this case, while conceding such to be not controlling, point out that an unchallenged practice, indulged in by the state court, of extending its jurisdiction into this reservation should be accepted as giving weight to the fact that the state court could extend its jurisdiction into this territory. It was on such a theory condemned by the Allied Nations, that Hitler invaded certain European countries, claiming that the laws of Germany followed German settlers having migrated to those countries prior to such invasion. He insisted that the laws of Germany should be extended into those countries to protect such settlers or "German minorities."

Any direct allusion, intimation or inference to the effect that a reversal in this case would deprive the lessees of the lands in question of the benefit of white man's laws in a white man's city is apparently an oversight of the fact that the applicable Federal laws should not be classified as barbaric.

In connection with any such intimation or inference it should be noted that the welfare and protection of the Indians living on the Allegany and Cattaraugus Reservations are still a matter of national concern.

That those Indians have good cause to oppose being subjected to State laws is to be evidenced from a reading of U. S. vs. Forness, 125 Fed. 2d, 928, which case is discussed and quoted on pages 25 to 28 of appellant's main brief.

Also illustrative of what the Indians are to expect in civil cases, if subjected to the jurisdiction of New York State Courts, is to be found in the case of Marion John as Administratrix, etc., v. M. Murphy and Son, Inc., *et al.*

In that case the widow sued in the State Court in a negligence action for the death of her husband on behalf of herself and her children. A jury of white men within the County of Cattaraugus returned a verdict of no cause of action. The Trial Court set the verdict aside on the ground that the facts were clearly such as to have entitled her to a verdict. The Appellate Division, on March 10, 1943, sustained the Trial Court. (Case No. 8 in Vol. 2733, of Cases and Points of New York Supreme Court, Appellate Division, Fourth Department; 41 New York Supp. 2d Series 184.) If subjected to state jurisdiction, these Indians, involved in litigated matters, will be at the mercy of a jury, which will, in most instances, include lessees of their lands who resent paying, or refuse to pay the small rentals charged under the long term leases.

The federal law, aside from providing adequate laws and procedure, adopts by reference any state penal law not included in the federal laws (section 468, Title 18 U. S. C.). Such adopted crimes are, however, prosecuted in the Federal Courts.

(Puerto Rico vs. Shell Co., 302 U. S. 263, p. 266, citing U. S. vs. Press Pub. Co., 219 U. S. 1; Franklin vs. U. S., 216 U. S. 559.)

The attention of this Court is directed to the fact that the occupants of these lands fail to contribute to the state tax burden imposed on the lands of other residents of the State of New York. (18 Stat. 330, ch. 90, Sec. 8). For that

reason they should not be entitled to complain, when deprived of the benefit of State Laws which would operate to their convenience and the detriment of the Indians.

They have sought occupancy of those tax-free and low rental lands for their own enrichment. The selfish purposes of a large number of those occupants to invoke state law to evade cancellation of their leases, because of nonpayment of a small rental, was exposed in the Forness case, *supra*. Such clearly evidenced one of the many such reasons for seeking to extend the state laws into those lands.

Respondents in their argument and some of the Courts in their opinions in this case went to great lengths to search out material which would overrule the interpretation of the word "municipal" by the United States Circuit Court of Appeals in the Forness case, *supra*. They overlooked the General Municipal Law of the State of New York. Section 2 of that law defines the term "municipal corporation" as follows:

> "The term 'municipal corporation' as used in this chapter, includes only a county, town, city and village. The term 'governing board' includes the board of Supervisors of a county, the town board of a town, the common council of a city, and the board of trustees of a village."

In addition to overlooking the definition itself, they have also overlooked what appears on page 2 of McKinney's General Municipal Law under the title "Consolidators' Notes on the General Municipal Law" and the historical note following that.

Although appellant feels that the facts in the affidavit of Charles E. Congdon submitted by respondent, (R. 16 to

20) are in no way necessary for a determination of this issue, the attention of this Court is directed to the fact that he was the attorney for the Forness family in the United States Circuit Court of Appeals in the Forness case, *supra*.

Furthermore, in connection with that affidavit, attention is called to the fact that it is somewhat in the form of a brief and deals with some of the facts in a general way. For that reason, the affidavit should be read in connection with the facts as outlined in three recent cases. Those cases are:

Forness case, *supra*.
Wood against City of Salamanca, 289 N. Y. 279.
Salamanca against Seneca Nation, 47 F. Supp. 939.

The Circuit Court of Appeals Record in the Forness case reveals that of the 1,881 leases outstanding in 1911, 1,095 were in default, the total arrears amounting to $16,356.34 (R. 265, 273-277).

The Wood case, *supra*, discloses that there are 800 forfeitures existing and that this amount is being increased.

Respectfully submitted,

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